



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 122 OF 2007

1. M'BECHI NKANDAU

2. M'MURITHI M'MBWIRIA

3. JOSEPH MIKUMI M'NJOGU

4. M'ITONGA MUTUNGA

5. FRANCIS KAMAU NGUGI PLAINTIFFS/APPLICANTS

6. JOSEPH MBUTU M'IMANYARA (Suing on behalf of the 14 persons whose list Of names is attached with this plaint

VERSUS

1. THE HON. ATTORNEY GENERAL

2. DIRECTOR OF LAND ADJUDICATION & SETTLEMENT DEFENDANTS

3. LAND REGISTRAR – MERU

4. ALL THE PLAINTIFFS IN CMCC NO.87/97 AND

HC.CC NO.78/02(LIST HEREIN ATTACHED)

RULING

The applicants by an application dated 11th August, 2011 seek that court grant orders of inhibition and orders of status quo under Section 128 of the Registered Land Act and Order L.Rule 1 of Civil Procedure Rules

The application specifically seeks the following orders:-

1. *That Honourable court be pleased to grant orders of inhibition to stop or inhibit any dealings with land parcels Nos. KIAMURI "A"/283,284,286,287,291,293,294,295,448,468,1018,1217,1130, and 1132 until the final determination of the suit herein.*

2. *That the Honourable court do deem it fit to order status quo which had persisted prior to filing of this suit, be maintained with respect to occupation and enjoyment of the said land parcels.*

The application is based on the following grounds:-

(a) *The plaintiffs are in occupation and possession of parcels of subject matter in dispute, however 4th defendants have title deeds.*

(b) *That the gist of this suit is misinterpretation of Section 29 of the Land Consolidation Act Cap.283 of Laws of Kenya, which resulted to the 4th defendants being issued with title deeds irregularly.*

(c) *That there is a pending suit in HCCC 78 of 2002 filed by the 4th defendants jointly against the plaintiffs herein seeking orders of eviction, which such is yet to be heard and determined.*

(d) *That the 4th defendants have started erecting fences and inviting prospective purchasers.*

(e) *That it is in the interest of justice to grant orders sought in order to prevent the subject matter of this suit from being alienated or disposed off to third parties.*

(f) *That no prejudice will be suffered by the 4th defendant/respondents since they have never occupied the land nor do they have court orders for eviction.*

The application is further supported by affidavit of M'Itonga Mutunga dated 11th August, 2011. The deponent states that on 9th June, 2011 several people claiming to be registered owners of the disputed parcel visited the locus in quo with intention of evicting the applicants and erecting fences. The applicants claim though 4th defendant's claim to be registered and have title deeds, the applicants have been the original occupants and are apprehensive that the registered owners will alienate and/or dispose of the land parcels to third parties thereby complicating the suit. The applicants deposed that in the interest of justice and in prevention of complicating this suit that court do inhibit any dealings in the land parcels subject matter of this suit until the suit is heard and determined. The applicant's further state that status quo be maintained to the effect that all original occupiers continue to occupy their respective parcels until the suit is finally heard and determined.

It is further stated in the supportive affidavit that it is necessary to restrain the 4th defendants, their agents, servants or any person claiming through them from evicting original occupiers and/or erecting any fences pending the hearing and determination of this suit.

The 4th defendants opposed the application and relied on Affidavit dated 26th September, by Julius Kirimi Magiri and further affidavit dated 30th September, 2011 by Mutwiri Tarcisious Mugambi.

I have gone through the said replying affidavits and I have gathered contents thereto to state that the respondents are registered proprietors of the suit premises. That the respondents

have developed their portions. That the said parcels are not occupied by other persons other than the respondents and that the applicants are not in occupation. The respondents have stated that they have no intention of selling the suit premises. It is deponed that the applicants have sworn false affidavits.

It is deponed the 4th plaintiff does not even live near KIAMURI "A" area as he lives at Kariene location which is 20KM from "Kiamuri" "A" and has not suffered any loss or damage to warrant orders of inhibition.

The respondents aver that they will be greatly prejudiced and will suffer irreparable loss and damage if suit parcels are inhibited as prayed by the plaintiffs. It is further stated the suit is vague as it does not mention the parties who are sued as defendants and therefore the plaintiffs have withheld vital material particulars and have not sought leave of the court to file this suit on behalf of other persons.

It was argued before the court that registered proprietors (defendants) who were referred to court as 4th defendants are in the process of disposing the suit premises and if the suit premises are sold the suit would be complicated. No evidence was produced to show the said threat of selling of the disputed land. It was submitted that the plaintiffs have been in occupation since Land Adjudication Process but it was not disclosed to court since when the applicants started being in occupation. The specific portion occupied by each party has not been disclosed. The respondents Julius Kirimi Magiri and Mutwiri Tarcisious Mugambi have in their affidavits claimed to have been in occupation of "KIAMURI" "A" 290, 292, 468, 1017, 1147 and 981 and to be rightful owners; as per attached abstracts of titles.

It is further stated that none of the plaintiffs live on the suit premises. The application is said to be supported by affidavit of M'Itonga Mutunga who is said to be a representative of other 14 persons as per list of names attached to the plaint.

I have seen a document attached to the plaint headed as follows:-

" List of parties)"
and verifying affidavit dated 27th September, 2007 in which under paragraph 1 states:

" (1) That I am one of the plaintiffs and also one of the representatives of the other 14 plaintiffs in this suit."

Mr. M'Itonga Mutunga in his application claim and in his supporting affidavit states:-

" 1. That I am the 4th plaintiff herein and also one of the nominated representatives of the other 14 parties in this representative suit.

2. That I have been authorized by all the other plaintiffs and the representatives to swear this affidavit"

The question that one has to pause is was Mr. M'Itonga Mutunga properly appointed?
What is the proper procedure to be followed in a representative suit?

Order 1 Rule 8 of Civil Procedure Rules provides:-

" 8 (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
(2) The parties shall in such case give notice of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

Order 1 Rule 12 Civil Procedure Rules provides:-

" The court may give the conduct of the suit to such persons it deems proper"

Order 1 Rule 13(1) and (2) Civil Procedure Code provides:-

" (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one anyone or more of them may be authorized to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in this case".

I have perused the pleadings and note at the time of filing the suit the 14 persons did not give written authority to M'Itonga Mutunga and five others. The authority was not filed and duly served with summons to enter appearance. The proper procedure laid down under Order 1 Rule 13(1) and (2) of Civil Procedure Rules was not followed and the plaintiffs were not properly appointed at all.

I find in this case the plaintiffs have not complied with Order 1 Rule 13(2) of Civil Procedure Rules and to allow the applicants to continue to purport to represent the plaintiffs would amount to miscarriage of justice as no proper procedure has been followed and no written authority has been filed indicating which parties wanted to be represented by who in the suit. The names of the plaintiffs are also in the list of parties; headed instructions to file representative suit but no one is shown to have appointed to file a representative suit.

In this suit the 4th defendant/respondent in the plaint and in the application is recorded as follows:-

" ALL The Plaintiffs In CMCC No.87/97 And HCCC No.78/2002(List herein attached)".

I have had an opportunity of perusing HCC 78 of 2002 and CMCC 83 of 1997 attached but not CMCC 87/1997. The individual names of the defendants or particulars of the defendants ought to have been listed contrary to the pleadings in plaint filed on 31/10/2007 by M. M. Kioga Advocates.

The respondents under paragraph 11 and 9 of their replying affidavits state that the suit is vague as it does not mention the names of the parties sued and that the applicants had withheld vital information to the court. They sought the suit to be dismissed.

Order 4 Rule 1(1) (c) of Civil Procedure Rules provides:-

" (1) (1) The plaint shall contain the following particular:.....
(c) The name, the description and place of residence of the defendant, so far as they can be ascertained".

The applicants in their plaint under Paragraph 5 states as follows in respect of the 4th defendants:-

“ The 4th defendants were all or some of the defendants who were recorded and acted as the respondents in the plaintiff’s appeal to the Minister being Appeal No.137 of 1991 and who subsequently became the Registered Proprietors of the parcels of lands included in the schedule to this plaint and who also came to file and became plaintiffs in C.M.C.C No.83 of 1997 and subsequently transferred to High Court as HC.CC No.78 of 2002(Their list is similarly attached in schedule “B” attached HEREIN).

The applicant’s plaint offends the provisions of Order 4 Rule 1(1) (c) of Civil Procedure Rules in failing to put the name(s), description and place of residence of the defendant(s). It is mandatory to give such particulars and failure to do so means there is no defendant.

Paragraph 4 of the plaint fails to comply with mandatory provision of Order 4 Rule 1(1) (c) of Civil Procedure Rules.

I am in agreement with contents of respondent’s affidavit that the plaintiffs’ application is vague as it does not mention the parties who are sued as 4th defendants.

The court is asked to issue inhibition orders and orders of status quo against unnamed 4th defendants. Issuing such orders would be orders in vain. I do not see any reason of issuing orders which cannot be enforced as defendants are not sufficiently described or named at all.

I further find that the said defendants have been in occupation of land and not the applicants as per respondents’ affidavits. Issuing orders as sought would mean evicting the respondents and the respondents would be prejudiced.

It has further been submitted that it is over four years since the suit was filed and no application had been filed to challenge the respondents’ occupation.

I find the delay in filling application unjustified, and if any orders restraining the respondent are granted the respondents would be prejudiced. The respondents have in their affidavits stated that they have no intention of selling any of the suit properties. I note no evidence has been tendered before the court that the respondents are intending to alienate the suit premises

I am satisfied that no sufficient grounds have been advanced to enable court to restrain the respondents from occupying and using the suit premises. The respondents have stated that they have been in occupation of the land and the applicants stay far away. This has not been challenged by way of supplementary affidavit.

I therefore reject prayers 2 and 3 of the applicant’s application.

Costs of the application to the respondents.

DATED AND DELIVERD AT MERU THIS 16TH DAY OF NOVEMBER, 2011

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Kioga for the respondent
- 2.

J. A. MAKAU
JUDGE